Supreme Court, U.S.
FILED

03 638 OCT 22 2003

(1)

No. 03-

IN THE

Supreme Court of the United States

LIBERTY MUTUAL INSURANCE CO.,
Petitioner,

v.

CALDWELL TRUCKING PRP GROUP,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W
Washington, D.C. 20006
(202) 383-5300

JOHN C. SULLIVAN
(*Counsel of Record*)
POST & SCHELL PC
Four Penn Center
1600 John F. Kennedy Boulevard
Philadelphia, Pennsylvania 19103
(215) 587-1000

Attorneys for Petitioner

106 pp

QUESTION PRESENTED

Whether it is a violation of the Due Process Clause or the Takings Clause for a state supreme court to impose millions of dollars in retroactive liability on an insurer by nullifying an unambiguous insurance contract provision solely for the purpose of promoting a judicially created policy of increasing the money available to pay for environmental clean up.

LIST OF PARTIES AND CORPORATE DISCLOSURE

The petitioner is Liberty Mutual Insurance Company. Liberty Mutual Group Inc. owns 100 percent of the stock of Liberty Mutual Insurance Company. LMHC Massachusetts Holdings Inc. owns 100 percent of the stock of Liberty Mutual Group Inc. Liberty Mutual Holding Company Inc. owns 100 percent of the stock of LMHC Massachusetts Holdings Inc. No publicly traded entity owns any stock of any of the above-named entities.

Respondent is the Caldwell Trucking PRP Group. Caldwell Trucking PRP Group is an unincorporated association of parties alleged by the United States Environmental Protection Agency to be responsible for the remediation of hazardous substance contamination at the Caldwell Trucking Superfund Site. The Caldwell Trucking PRP Group consists of: Schering-Plough Corporation, E.I. du Pont de Nemours and Company, Kearfott Guidance & Navigation Corporation, Saltire Industrial Inc., Curtiss-Wright Corporation, BP p.l.c., Cooper Industries, Inc., and Englehard Industries, Inc.

The other parties who participated in the proceedings before the Supreme Court of New Jersey were American Home Assurance Company, Industrial Underwriters Insurance Company, Lexington Insurance Company, and National Union Fire Insurance Company of Pittsburgh, PA.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES AND CORPORATE DISCLOSURE ii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

DECISIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Liberty's Non-Cumulation Clauses 2

B. The *Owens-Illinois* Decision 4

C. The *Carter-Wallace* Decision 7

D. The Proceedings and Decision Below 9

REASONS FOR GRANTING THE WRIT 15

I. THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE 17

A. The Decision Below Violates Liberty's Fundamental Rights To Contract, Which Are Protected From Arbitrary Judicial Impairment By The Due Process Clause 17

B. The Decision Below Violates Due Process Because It Imposes An Unpredictable, Severe And Unfair Retroactive Insurance Liability 21

II. THE DECISION BELOW VIOLATES THE TAKINGS CLAUSE 24

III. THE DECISION BELOW CONFLICTS WITH OTHER DECISIONS ENFORCING INSURANCE CONTRACTS CONSISTENT WITH THEIR LANGUAGE 25

IV. THIS CASE IS EXTREMELY IMPORTANT TO INSURERS AND INSUREDS IN NEW JERSEY AND ELSEWHERE 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases

Aerojet-General Corp. v. Transport Indemnity Co., 948 P.2d 909 (Cal. 1997) 27

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 18,19,20

Alpine Haven Property Owners Ass'n, Inc. v. Deptula, 830 A.2d 78 (Vt. 2003) 26

Armstrong v. United States, 364 U.S. 40 (1960) 25

BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) 22

Bouie v. City of Columbia, 378 U.S. 347 (1964) 17

Caldwell Trucking PRP Group v. Spaulding Composites Co., 890 F. Supp. 1247 (D.N.J. 1995) 10

Carmell v. Texas, 529 U.S. 513 (2000) 18

Carter-Wallace, Inc. v. Admiral Ins. Co., 712 A.2d 1116 (N.J. 1998) 7,8,9,11,14,23

City of Los Angeles v. Manhart, 435 U.S. 702 (1978) 28

Cohen v. Cohen, 126 N.J.L. 605 (N.J. 1941) 20

Columbia Propane, L.P. v. Wisconsin Gas Co., 661 N.W.2d 776 (Wis. 2003) 26

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 15,21,22,23,24,25

Elliott v. Darwin Neibur Farms, 69 P.3d 1035 (Idaho 2003) 26

Flynn v. Hartford Fire Ins. Co., 370 A.2d 61 (N.J. Super., App. Div.), *certif. denied*, 379 A.2d 236 (N.J. 1977).....13

Hardee v. Hardee, 585 S.E.2d 501 (S.C. 2003).....26

Hertz v. Clovis, 578 S.E.2d 391 (W. Va. 2003).....26

Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).....18,19

Insurance Co. of North America v. Continental Casualty Co., 575 F.2d 1070 (3d Cir. 1978).....11

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951).....16

Kampf v. Franklin Life Ins. Co., 161 A.2d 717 (N.J. 1960).....14

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).....18,20

Landgraf v. USI Film Prods., 511 U.S. 244 (1994).....18,21

Linden Motor Freight Co., Inc. v. Travelers Ins. Co., 193 A.2d 217 (N.J. 1963).....13

Medlar v. Aetna Ins. Co., 248 A.2d 740 (Vt. 1968).....27

Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974 (N.J. 1994).....*passim*

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).....22

Quill Corp. v. North Dakota, 504 U.S. 298 (1992).....22

Rogers v. Tennessee, 532 U.S. 451 (2001).....22

Rosen v. State Farm Gen. Ins. Co., 70 P.3d 351 (Cal. 1993).....27

Standard Banner Coal Corp. v. Rapoca Energy Co., 576 S.E.2d 435 (Va. 2003).....26

Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924) 17

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 18

Wilkie v. Auto-Owners Ins. Co., 664 N.W.2d 776 (Mich. 2003) 26,27

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 22

Yarcheski v. Reiner, 669 N.W.2d 487 (S.D. 2003) 26

Constitutional Provisions

U.S. Const., Art. I, § 10, cl. 1 1,17,27

U.S. Const. amend. V 1,24

U.S. Const. amend. XIV 1

Statutes

28 U.S.C. § 1257(a) (1993) 1

Books, Treatises and Journals

Developments in the Law – Toxic Waste Litigation, 99 Harv. L. Rev. 1458 (1986) 5

The Federalist, No. 44 (James Madison) (Clinton Rossiter ed., 1961) 18

The Federalist, No. 84 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 18

Holmes, The Path of the Law, 10 Harv. L. Rev. 457 (1897) 15,16

Jones & Hurwitz, *An Introduction to Insurance Allocation Issues In Multiple-Trigger Cases*, 10 Vill. Envtl. L.J. 25 (1999) 6

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of *certiorari* issue to review the judgment of the Supreme Court of New Jersey in this case.

DECISIONS BELOW

The opinion of the New Jersey Supreme Court is reported at 819 A.2d 410 and is reprinted in the Appendix ("App.") hereto at 1a. The opinion of the New Jersey Superior Court, Appellate Division, is reported at 787 A.2d 238 and is reprinted at App. 25a. The judgment of the trial court is unreported and is reprinted at App. 38a.

JURISDICTION

The opinion of the New Jersey Supreme Court was issued on April 10, 2003. A timely motion for reconsideration was denied on June 23, 2003. Justice Souter extended the time in which to file this petition to October 22, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) (1993).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause, U.S. Const. amend. XIV, provides:

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . .

The Takings Clause, U.S. Const. amend. V, provides:

> . . . nor shall private property be taken for public use without just compensation . . . .

The Contracts Clause, U.S. Const., art. I, § 10, cl. 1, provides:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .

STATEMENT OF THE CASE

The case raises a novel but profoundly important question: whether there are any federal constitutional limits on the power of a state supreme court to nullify, retroactively, the unambiguous contractual rights of a private party. It is beyond dispute that the opinion below, were it a law enacted word-for-word by the New Jersey Legislature, would be a blatant and egregious violation of the Contracts Clause of the U.S. Constitution and the even more fundamental constitutional security against retroactive laws that the Clause embodies. The question for this Court is whether a state supreme court has a broader constitutional authority to override the settled and unambiguous obligations of private contract, and even if so, whether such authority is functionally unlimited, as it would have to be for the decision below to stand.

A. Liberty's Non-Cumulation Clauses

This case involves nine insurance contracts entered into by petitioner Liberty and Spaulding Composites Company, between 1976 and 1984. The contracts provided "comprehensive general liability" (CGL) insurance. Each of the policies included two provisions which explicitly limit the amount of risk accepted by Liberty under its policies. First is a Declarations schedule which identifies the dollar limits for the different types of coverage provided. The 1976 contract had a $500,000 liability limit for each occurrence; the subsequent eight contracts each limited coverage to $1 million in liability for each occurrence. Second, each of the policies included a Limits of Liability section which specified how the dollar figures applied to different types of claims covered by the policy. The Limits of Liability section stated that the dollar limitation applicable to "each occurrence" was "the *total* limit of the company's liability for all damages because of bodily injury, personal injury or property damage as the result of any one occurrence." App. 66a (emphasis added).

As part of the Limits of Liability section, each contract included an identical clause – the "non-cumulation clause" – addressing and prohibiting the cumulation of liability over successive contracts. The clause accomplished this result in two steps. First, the clause provided that

> For the purpose of determining the company's total liability, all bodily injury, personal injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be construed as arising out of one occurrence.

App. 66a. In other words, the parties agreed by contract that they would treat an injury that occurs or reoccurs over time – i.e., environmental contamination from chemical exposure – as but a single occurrence for purposes of establishing Liberty's total liability for the costs of such an injury.

Second, the "non-cumulation" clause provided that the amount of liability incurred under any one contract for "one occurrence" (contractually defined, as noted, to include continuous exposures) "shall be reduced by the amount of each payment made by the company with respect to such occurrence under a previous policy of which this policy is a replacement." Thus, if Spaulding incurred, say, $10 million in liability for environmental contamination that began during the first of its contracts with Liberty and continued for each of the nine years in which Spaulding had a Liberty policy, Liberty would never be liable for more than $1 million. In year one, Liberty would owe the policy maximum of $500,000. In year two, Liberty would owe that year's policy maximum of $1 million reduced by the $500,000 already paid out under the first year's contract, meaning $500,000 in the second year and a total of $1 million over the first two years. In year three, Liberty again would owe that year's policy maximum of $1 million, this time reduced by the full $1 million already paid out under the prior policies, for a total of zero additional liability. Year four, and all subsequent years would be the same: Liberty's liability for costs associ-

ated with this single occurrence would be the maximum $1 million for that year, reduced by the full $1 million already paid out. In this way, the clause operated to prevent Liberty's liability from cumulating under each successive contract for each successive year with respect to a single occurrence.

The insurance contracts between Liberty and Spaulding were primary policies, i.e., policies that provided first-level coverage. Throughout the period that Liberty provided insurance to Spaulding, Spaulding also purchased excess policies, i.e., policies that provided second-level coverage which would be implicated if Liberty had paid its limit of liability for a particular occurrence. Each of these excess policies contained a non-cumulation provision which was substantively similar to the Liberty provision. *See* PRP N.J. S.Ct. Br., App., at a92-103.

Thus, when the parties entered into the contracts, they necessarily understood from the contracts' plain terms that Liberty's total potential liability for any one occurrence of environmental contamination, regardless how long the contamination occurred, was fixed: Liberty would be liable for a total of $1 million and not one penny more. The price Spaulding paid for its insurance for each year was necessarily premised on the parties' explicit understanding that Liberty would be assuming exactly that amount of risk for an event of contamination and no more – for the price of insurance, of course, reflects nothing more or less than the value of the risk being transferred.[1]

B. The *Owens-Illinois* Decision

In 1994, almost ten years after the expiration of the last of Spaulding's contracts with Liberty, the New Jersey Supreme Court decided *Owens-Illinois, Inc. v. United Ins. Co.*,

---

[1] As anyone who has purchased homeowners' insurance knows, the more coverage one has, the higher one's premiums will be.

650 A.2d 974 (N.J. 1994). *Owens-Illinois* addressed the then-emerging problem of how to allocate insurance liability for an injury that occurs over a long period of time (such as asbestos injury or environmental contamination), during which the insured has successive insurance policies in effect. The first question the court addressed was how to decide when an injury "occurs" within the meaning of contracts that provide coverage for each "occurrence." The court observed that at least three possible alternative conceptions of when *injury* has occurred had been adopted by courts in other jurisdictions. *See Owens-Illinois*, 650 A.2d at 980-81 (quoting *Developments in the Law – Toxic Waste Litigation*, 99 Harv. L. Rev. 1458, 1579-81 (1986)). Under the "exposure" theory, the injury occurs when the injury-causing agent first contacts the body or property. *Id.* at 980. Under the "manifestation" theory, the injury occurs when the injury physically manifests itself in the body or on the property. Under the "continuous trigger" theory, the injury occurs continuously, as long as the injury-causing agent is affecting the body or property.

As *Owens-Illinois* reflects, the choice among these alternatives has significant consequences for insurance coverage. Depending on the theory chosen, the injury could "occur" only at one fixed moment for the purpose of triggering policy coverage, meaning that an insured would be covered only by the policy in effect at that moment. Under the "continuous trigger" theory, by contrast, the injury would "occur" in each of the years of successive policies, thereby potentially requiring the insurer to provide coverage up to the maximum of each year's policies. In this way, unless the contract specified otherwise, the insurer's liability could be cumulated over each of its successive policies.

The *Owens-Illinois* court adopted the "continuous trigger" theory and thus held that, where an insurance contract does not bar cumulation, "courts may reasonably treat the progressive injury or damage as an occurrence within each of

the years" of successive CGL policies. *Id.* at 995. Notably, *Owens-Illinois*'s resolution of this question did not address non-cumulation clauses, which were not involved in the case in any way. Rather, the adoption of the "continuous trigger" theory only paved the way for the court to answer the real question in the case: how to allocate among many insurers the insured's liability for injuries caused over a long period of time, when the insured had different policies and different insurers. *See id.* ("Because multiple policies of insurance are triggered under the continuous-trigger theory, it becomes necessary to determine the extent to which each triggered policy shall provide indemnity.").

The court adopted a pro rata theory of allocation: the insured's total coverage during the period of liability is established; each insurer's total potential liability during that period is assessed and compared to the insured's total coverage, producing each insurer's proportionate or pro rata share of total coverage; and then the insured's actual costs for the period are allocated to each insurer in accordance with the insurer's proportionate share of total coverage for the period.[2]

---

[2] As the decision below explained it

> The basis of an individual insurer's liability is the aggregate coverage it underwrote during the period in which the loss occurred. Basically, a given insurer's liability is determined by comparing its particular exposure to the total amount of exposure assumed by all carriers of the triggered policies. This comparison yields a percentage that is then applied to the amount of loss the policyholder sustained.

App. 12a (quoting Jones & Hurwitz, *An Introduction to Insurance Allocation Issues In Multiple-Trigger Cases*, 10 Vill. Envtl. L.J. 25, 44-45 (1999)). In addition to this basic allocation rule, the *Owens-Illinois* court held that, for any years in which the insured was not covered, neither proportionate liability nor actual costs would be allocated to any insurer; instead the insured, who accepted the risk for that period, was required to

As noted, the insurance contracts at issue in *Owens-Illinois* did not include non-cumulation of liability limitations, and the court gave not the least intimation that such clauses would henceforth be void – much less retroactively void – as a result of its allocation ruling. To the contrary, the *Owens-Illinois* court specifically cautioned that its decision did not speak to the cumulation (or "stacking") of coverages under *successive* policies: "[T]o say that coverage is afforded under more than one policy seems different from saying that a policyholder may stack the limits of all the policies in effect during a period of repeated or continuous exposure." *Id.* at 990. The *Owens-Illinois* court also did not declare any policy language unenforceable. Again to the contrary, the court specifically acknowledged that "the contract of insurance" provides the source of any duty of an insurer "to pay any judgments." *Id.* at 978. The court found only that the particular policy language under consideration in that case was inapplicable.

C. The *Carter-Wallace* Decision

The New Jersey Supreme Court applied the *Owens-Illinois* rule four years later in *Carter-Wallace, Inc. v. Admiral Ins. Co.*, 712 A.2d 1116 (N.J. 1998), another case that had nothing to do with non-cumulation clauses. Whereas *Owens-Illinois* involved the allocation of liability among different insurers with successive polices, *Carter-Wallace* involved the allocation of liability among different insurers with concurrent policies providing coverage at different levels – specifically, "primary" and "excess" insurers – in continuous trigger liability situations. "Primary" insurance provides initial coverage up the limits of the contract. "Excess" or "secondary" insurance provides additional coverage, typically only after the primary coverage has been exhausted.

---

bear the pro rata share of costs incurred during that period. *Owens-Illinois*, 650 A.2d at 994.

Allocation of liability between primary and excess insurers can be difficult in progressive injury cases, because during a multi-year period of injury, the insured is likely to have different primary and excess insurance contracts with different insurers with different amounts of coverage.

The excess insurer in *Carter-Wallace* argued that excess liability did not attach under *any* of the insured's excess insurance policies until the insured had exhausted *all* of its primary coverage for every year in effect during the period of injury. As a result, the excess insurer argued, if all of the primary coverage sufficed to cover the total costs of the injury, then no excess insurer would be liable. The New Jersey Supreme Court opted for a different rule: in progressive injury cases, the insured's total liability would be allocated pro rata for each year, and then each year's pro rata amount of liability would be assigned to primary and excess insurers in accordance with the policies in effect that year. Thus if the pro rata amount of liability in the first year exhausted the insured's primary coverage in that year, any excess insurer with a contract that year would be liable for any remaining amount for the year, up to the limits of its coverage in that year, and so on.[3] The court reasoned that "this approach makes efficient use of available resources because it neither minimizes nor maximizes the liability of either primary or excess insurance, thereby promoting cost efficiency by spreading costs." *Id.* at 1124. The court also found that this approach "promotes simple justice, by respecting the differ-

---

[3] Suppose, for example, an insured incurred $10 million in liability for a ten-year progressive injury. The court would allocate $1 million of that injury to each of the ten years. Then the court would look to the policies in effect for each year. So, in year one, if an insured had $500,000 in primary coverage with insurer A and $500,000 in excess coverage with insurer B, each insurer would owe the limits of the policy. If in year two the insured had increased its coverage with insurer A to $1 million while keeping the same excess coverage with insurer B, then insurer B would owe nothing in year two.

ence between primary and excess insurance while not permitting excess insurers unfairly to avoid coverage in long-term, continuous trigger cases." *Id.* at 1121.

Although thus driven by concerns for efficiency and simple justice, neither the *Carter-Wallace* reasoning nor its result undermined – much less contradicted – any explicit contractual language in the applicable policies. Even more to the present point, nothing in the reasoning or result of *Carter-Wallace* addresses or even relates to the validity of non-cumulation clauses in primary CGL policies.

D. The Proceedings and Decision Below

Thus, until this case, New Jersey's leading insurance allocation precedents had hewed closely to the relevant contract language, applying broader policy concerns only to resolve matters unaddressed in the terms of the applicable insurance contracts. Breaking sharply from its own prior case law – and from its constitutional obligations to respect Liberty's firmly fixed, contractually based expectations – the New Jersey Supreme Court in this case held flatly void a directly applicable, unambiguous provision limiting Liberty's liability for costs incurred by its insured in cases of progressive injury. The court cited both *Owens-Illinois* and *Carter-Wallace* as supporting this result, but the citations are both wrong and irrelevant to the constitutional issue this petition raises. They are wrong because neither opinion suggests in any way that non-cumulation clauses are void under New Jersey law. They are irrelevant because even if the opinions did support such a result, the first of them was issued almost ten years after the last of the contracts at issue here expired, and thus in no way could have affected the parties' expectations when Liberty and Spaulding agreed to the liability limitation and priced the contracts on that basis.

1. Liberty's basic coverage responsibilities arose when Spaulding was identified in 1990 as a potentially responsible party for the disposal of hazardous lead-containing wastes at

the Caldwell Trucking Superfund Site in Fairfield, New Jersey. App. 4a. Spaulding declared bankruptcy in 1993. App. 4a. Caldwell Trucking Group PRP ("PRP") and the EPA filed a federal action against Spaulding in 1994 seeking to hold Spaulding responsible for cleanup costs. App. 4a.[4] In 1996, the district court granted PRP partial summary judgment, holding Spaulding liable for an undetermined amount of the cleanup costs incurred by PRP. App. 4a. Judgments of liability were ultimately entered against Spaulding totaling over $13 million. App. 5a.

In 1995, Spaulding began a state-court action seeking a declaratory judgment as to the liability of its insurers, including Liberty, for its potential cleanup responsibilities at the Caldwell Trucking site. Spaulding argued that it was entitled to $8.5 million in total coverage from Liberty across all nine of its contracts; Liberty argued that, under the plain language of the non-cumulation clause, its liability was limited to $1 million. The trial court granted Spaulding summary judgment, holding Liberty's non-cumulation clause to be "inapplicable" because it was "intended to govern cases involving a *single* occurrence causing damage over multiple years," App. 5a (emphasis added), whereas it read *Owens-Illinois* as holding that continuous environmental injury was to be treated as a "*separate* occurrence 'within each of the years of a CGL policy.'" App. 5a (emphasis added).

2. The Appellate Division reversed. The court's conclusion was simple and unassailable: "[T]he contract language

---

[4] PRP initially joined Spaulding's insurers, including Liberty, as direct defendants, seeking contribution for Spaulding's cleanup responsibilities. *Caldwell Trucking PRP Group v. Spaulding Composites Co.*, 890 F. Supp. 1247 (D.N.J. 1995). The claims against Spaulding's insurers were dismissed on the ground that PRP itself had no claim against the insurers. *Id.* at 1256.

of the non-cumulation clause is clear and should be enforced." App. 27a. The court specifically addressed *Owens-Illinois* and *Carter-Wallace*, but "perceive[d] no inconsistency" between those decisions and "applying the clear language of Liberty's non-cumulation clause." App. 35a. The court noted that in both cases the New Jersey Supreme Court had been "unable to find the answer to the allocation issue in the language of the policy" and also had "found 'the traditional rules of interpretation to be unhelpful.'" App. 35a (quoting *Owens-Illinois*, 650 A.2d at 990). Accordingly, while it was proper for the prior decisions to follow "a method that was fair in light of the complexities of environmental litigation" where there was no contract language on point, in this case the Appellate Division could "find the answer in the clear language of the policy" and thus was "compelled" to apply that language. App. 35a. The court also rejected PRP's argument that the non-cumulation clause was an impermissible "other insurance" clause. The court held that other insurance clauses, including "escape" clauses, apply only when there are *concurrent* policies (typically written by different insurers) in effect. App. 36a. The non-cumulation clause, the court explained, was implicated by the *successive* policies of a single insurer, and thus was not an "other insurance" escape clause.[5] App. 36a. In fact, the "other insurance" provisions of Liberty's policies were contained in separate endorsements from the non-cumulation clause.

3. The New Jersey Supreme Court granted leave to appeal and reversed, reinstating summary judgment in favor of

---

[5] In so ruling, the court also rejected the argument that the non-cumulation provision was an "escape" clause, a sub-category of other insurance provision. "Escape" clauses are looked on with disfavor by courts because they allow an insurer to escape liability altogether when other insurance applies. *See Insurance Co. of North America v. Continental Casualty Co.*, 575 F.2d 1070, 1072 (3d Cir. 1978).

PRP. PRP's main argument on appeal[6] was that the non-cumulation clause was not applicable because it was an "other insurance" clause. Like the Appellate Division, the New Jersey Supreme Court rejected this argument. All "other insurance" clauses, the court recognized, apply only when there are concurrent policies. Their point is to allocate among insurers with potentially overlapping coverage responsibilities. App. 20a. A non-cumulation clause, by contrast, applies when *one* insurer provides *successive* policies, as the court acknowledged. App. 20a. The point of a non-cumulation clause is not to allocate liability among different insurers, but to fix a limit on the total potential liability of the single insurer providing successive years of coverage. App. 20a ("a non-cumulation clause governs successive policies and prevents the accretion of limits when the policies have been triggered by a single occurrence").

The Court recognized that the non-cumulation language was directly relevant to the allocation issue:

> [A] non-cumulation clause generally, and Liberty's in particular, operates to limit an insurer's liability under multiple sequential CGL policies where losses related to a "single occurrence" trigger successive policies. . . . What the non-cumulation clause seeks to avoid is the "cumulation" of insurance policy limits when only one insured act or 'occurrence' is involved.

App. 21a. Nonetheless, this Court made an explicit determination to "look[] beyond contract language and traditional rules of insurance policy interpretation," App. 17a, rather than give effect to the contract language, stating:

> In a word, *Owens-Illinois* eliminated reliance on particular contract language (other than limits and exclu-

---

[6] While the appeal was pending, Spaulding assigned all of its rights to coverage to PRP.

> sions) and on traditional rules of interpretation, and set forth a uniform standard for resolving allocation issues in long-tail environmental exposure cases.

App. 19a.

The court held the clause to be void as a matter of law "because it would thwart the *Owens-Illinois* pro rata allocation modality." App. 22a. That "modality," the court explained, "has, at its core, a public policy that favors maximizing, in a fair and just manner, insurance coverage for cleanup of environmental disasters." App. 23a. The court further explained that if a non-cumulation clause were actually enforced in accordance with the contract's terms – in accordance, that is, with the parties' specific agreement, necessarily reflected in the cost of the coverage purchased – "insurers who were actually 'on the risk' would be insulated from their fair share of liability in direct contravention of *Owens-Illinois*." App. 23a. Finally, the court distinguished the many cases from other jurisdictions enforcing non-cumulation clauses on the ground that "none of the cases . . . involves the application of the continuous trigger and pro-rata allocation methodology of *Owens-Illinois*." App. 23a-24a.

The court's conclusion that *Owens-Illinois* necessarily rendered the parties' non-cumulation clause void – and retroactively void at that – could not have been more of a surprise to Liberty. When Liberty issued its first policy to Spaulding in 1976, it had already "long been the law of [New Jersey] that the court is bound to enforce the policy as it is written." *Flynn v. Hartford Fire Ins. Co.*, 370 A.2d 61, 63-64 (N.J. Super., App. Div.), *certif. denied*, 379 A.2d 236 (N.J. 1977). New Jersey courts had been "insistent that clear basic terms and particular provisions of an insurance contract may not be disregarded at will and a new contract judicially made for the parties." *Linden Motor Freight Co., Inc. v. Travelers Ins. Co.*, 193 A.2d 217, 225 (N.J. 1963). Accordingly, New Jersey law recognized that "[a]bsent statutory

prohibitions, an insurance company has the right to impose whatever conditions it desires prior to assuming its obligations and such provisions should be construed in accordance with the language used." *Kampf v. Franklin Life Ins. Co.*, 161 A.2d 717, 721 (N.J. 1960). *Owens-Illinois* itself certainly did not deviate from this settled tradition. To the contrary, the *Owens-Illinois* Court acknowledged unequivocally that "[t]he source of any duty on the part of the Insurance Companies to defend actions or to pay any judgments is *obviously* in the contract of insurance." *Owens-Illinois*, 650 A.2d at 978 (emphasis added). Indeed, the primary "public policy" the court below identified as at the "core" of *Owens-Illinois* – maximization of insurance coverage – was in fact *explicitly* rejected by the *Owens-Illinois* court as a sufficient basis for imposing coverage liability: "A rule of law premised on nothing more than the result-oriented goal of maximizing coverage has been described as judicial legislation. A more consistent principle is required." *Id.* at 981 (internal quotation marks omitted).

In short, in no prior case – not *Owens-Illinois*, nor *Carter-Wallace*, nor any other – had the New Jersey Supreme Court ever held that a "public policy" of maximization of coverage could operate to render an unambiguous liability limitation in an insurance contract null and void. And certainly no decision had ever done so in a case decided twenty years after the policies had expired, undoing expectations settled literally for decades.

Second, leaving the errors of state-law precedent to one side, the suggestion of the court below that insurers "on the risk" would be relieved of liability by enforcement of the non-cumulation clause is wrong – indeed, it is nonsensical. An insurer can be "on" no more risk than the insurer agrees by contract to assume. If the insurer and insured agree that liability will not cumulate over successive policies, the insurer's "fair share of liability" is fixed by that agreement. There is nothing "fair and just" about "maximizing" Lib-

erty's coverage far beyond the specific maximum set forth in the parties' own contract of insurance.

4. Liberty moved for reconsideration. Liberty's motion not only explained how the court had badly misread its precedents, but also specifically raised federal constitutional issues under the Due Process, Takings, and Contract Clauses in respect to the court's ruling declaring the non-cumulation clause retroactively void. App. 58a-65a. More than two months later, the court denied the motion for reconsideration. App. 43a. This petition followed.

REASONS FOR GRANTING THE WRIT

It is common ground on this Court that "an unfair retroactive assessment of liability upsets settled expectations, and it thereby undermines a basic objective of law itself." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 557 (1998) (Breyer, J., dissenting); *see id.* at 533 (plurality); *id.* at 549 (Kennedy, J., concurring). The retroactive and wholly unforeseeable nullification of the non-cumulation clause here literally deprived Liberty of due process of law: the court's decision is a brazen act of judicial legislation, suspending Liberty's liability limitation for the openly avowed purpose of increasing the amount of insurance money available for environmental cleanup in the State of New Jersey. If the New Jersey Legislature had tried to enact as statute the result in this case, it would have plainly violated fundamental constitutional constraints intended to protect settled expectations and to ensure that the lawmaking process does not entirely lose sight of its "law" component. If courts are bound by fewer explicit constitutional constraints than are legislatures, it is only because the Framers quite reasonably presumed that courts, by their very nature, are always bound by the law – a system of reasoning and judgment that, while capable of evolving, does so only by incorporating prior judgments and building slowly upon itself, with the ultimate goal of protecting and enforcing a system of ordered and reasonable expectations in private affairs. *See generally* Holmes, The Path of

the Law, 10 Harv. L. Rev. 457 (1897). If "due process *of law*" means anything, it must be this: the traditional process of reasonably predictable decisionmaking through which private entitlements are protected and private obligations enforced. *See Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring) (describing "due process of law" as "a delicate process of adjustment" that is "compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess").

The New Jersey Supreme Court departed radically from that tradition, and thus deprived Liberty of its right to "due process of law" in a most literal sense. Not only did the court wander far into the realm of legislative conduct, it went farther than even the legislature could ever go, explicitly impairing the obligation of Liberty's contracts and taking its property without just compensation. In order to increase insurance resources for environmental cleanup in the state, the New Jersey Supreme Court simply nullified an unambiguous limitation on the amount of liability Liberty had long ago agreed to assume for injuries caused by Spaulding. It did so even though Spaulding had never paid Liberty for the additional coverage it would now be receiving ($8.5 million in coverage obviously costs a lot more in premiums than $1 million in coverage), and it did so without providing Liberty any measure of compensation from the State for the new public burden of environmental cleanup the court had decided to impose on Liberty and other insurance companies. In substance, it is exactly as if Spaulding had paid for only $1,000,000 in coverage for environmental cleanup liabilities, but the Court nevertheless decided that Liberty should provide $8,500,000 in coverage, simply because the State would be better off if Liberty were forced to pay more for the injuries Spaulding had caused.

That is not due process. It is not even law. Certiorari should be granted.

I. THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE

The decision of the New Jersey Supreme Court in this case violates due process in two distinct but related respects. First, the decision violates the basic constitutional protection of contractual rights afforded by such provisions as the Contracts Clause, as the principles of that Clause are incorporated against judicial decisionmaking through the Due Process Clause. Second, the decision violates the Due Process Clause's more general proscription against the imposition of unpredictable, severely retroactive civil liability.

A. The Decision Below Violates Liberty's Fundamental Rights To Contract, Which Are Protected From Arbitrary Judicial Impairment By The Due Process Clause

The decision blatantly impairs the obligation of Spaulding's insurance contract with Liberty. That much is not even in dispute. The square holding and explicit point of the decision below is to nullify Liberty's contractually guaranteed limitation on the liability it was assuming, so that more money would be available for environmental cleanup.

The Contracts Clause of the U.S. Constitution states that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." Although the Clause by its own terms applies only to legislative enactments, *see Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 (1924), its basic protection of existing contractual obligations necessarily applies to judicial decisions under the Due Process Clause; otherwise, the protection afforded by the Clause would be a virtual dead letter. *Cf. Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964) ("If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.").

This Court has recognized that contractual rights are "matters in which predictability and stability are of prime importance." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 271 (1994); *see id.* at 265-66 ("In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequence of their actions."); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978) ("Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them."). The Framers shared that view in spades: they considered the rights explicitly protected by the Contracts Clause "to be 'perhaps greater securities to liberty and republicanism than any [the Constitution] contains,'" and violations of such rights to be "'contrary to the first principles of the social compact and to every principle of sound legislation.'" *Carmell v. Texas*, 529 U.S. 513, 521 (2000) (quoting *The Federalist*, No. 44, at 282 (James Madison), No. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). They believed the Clause necessary for at least two reasons: to bar states from retroactively "changing the relative situation of debtor and creditor," *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 427-28 (1934); *see Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 503 (1987) (Contract Clause's "primary focus was upon legislation that was designed to repudiate or adjust pre-existing debtor-creditor relationships that obligors were unable to satisfy."), and "to encourage trade and credit by promoting confidence in the stability of contractual obligations," *United States Trust Co. v. New Jersey*, 431 U.S. 1, 15 (1977). Those basic purposes would be frustrated just as easily by judicial suspension of contractual obligations as by legislative. It follows that courts must be bound to the essential principles, at least, of the Contracts Clause through every court's obligation to pro-

vide due process of law, even if courts are not bound to the letter of the Contracts Clause or to every detail of judicially-developed doctrine applying the Clause.

There is no doubt that the decision below, were it simply re-captioned "A Law Passed By The New Jersey Assembly," would violate the very essence of the rights protected by the Contracts Clause – and thus the rights also protected by the Due Process Clause. The Contracts Clause does not bar the enforcement of all laws that affect contractual obligations – inasmuch as virtually all economic legislation may have some effect on existing contracts – but the Clause does "impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." *Spannaus*, 438 U.S. at 242. If "the state law has, in fact, operated as a substantial impairment of a contractual relationship," as opposed to a mere "[m]inimal alteration," it is invalid. *Id.* at 244-45. Under this Court's precedents, an impairment is "substantial" if the contracting party "had no reason to anticipate" the impairment, and instead "relied heavily, and reasonably, on this legitimate contractual expectation in calculating" its obligations under the contract. *Id.* at 245-46. While a "temporary" impairment of contractual relationships might not be substantial, a law that works a "severe, permanent, and immediate change in those relationships—irrevocably and retroactively," *id.* at 250, obviously works a substantial impairment. The archetypal substantial impairment is one that "nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability" when those obligations are "in an area where the element of reliance [is] vital." *Id.* at 246-47.

That is exactly what the decision below does. Directly in the face of the Clause's most central purpose of barring states from "changing the relative situation of debtor and creditor," *Blaisdell*, 290 U.S. at 427-28; the decision "nullifies express terms" of the debtor-creditor insurance contract,

see Cohen v. Cohen, 126 N.J.L. 605, 609 (N.J. 1941) (insured-insurer relationship is "clearly that of debtor and creditor"), imposing "completely unexpected liability" and a "severe," "permanent," "immediate," and "retroactive" change in the parties' contractual relationship. This is all particularly harmful in an industry (insurance) where reliance on express contract terms is so critical, because the very nature of the industry depends upon being able to painstakingly analyze and calculate precise degrees of risk and transform that analysis into contractual terms. Just as the employer in *Spannaus* "made contributions to [its pension] fund based on actuarial predictions of eventual payout needs," *Spannaus*, 438 U.S. at 237, which were obviously based on its contractual obligations, so too did Liberty rely on actuarial predictions in forming its insurance contracts and determining the premiums it would charge.[7]

If the rights protected by the Contracts Clause mean anything, they must be secure against judicial infringement as well as legislative. This is not a question of interpretation committed to the courts, nor a question on the margins of contract enforcement – a question, say, of unconscionability or violation of public policy – where the exercise of reasonable judicial judgment is to be expected. This is a simple case of a state court refusing to enforce an unambiguous contractual right, for one reason – to make one party pay much

---

[7] Even a "substantial" impairment may be upheld if it is "necessary" to serve a "significant and legitimate public purpose." *Keystone Bituminous Coal*, 480 U.S. at 505. Environmental cleanup may be an important public interest, but the decision below does not even purport to explain why it is "necessary" to serve that interest by forcing insurers to pay many times more for cleanup than they ever promised to pay. If those actually responsible for environmental damage cannot or will not pay for clean-up, leaving the public with the bill, then the public must pay it – confiscating resources from individual private parties to pay for perceived public needs is precisely what the Contracts Clause, among other constitutional provisions, is supposed to bar the State from doing.

more than it owes because the public would benefit from the confiscation. That will not justify state action of any kind, much less action by a court bound to provide due process of law. The rights underlying the Contracts Clause are impaired not once but twice in this case – first, by failing to enforce the contract as indisputably written, and second, by giving force to a substituted contract that the parties never made, one in which the potential liability for a continuing occurrence is $8,500,000 rather than $1,000,000.

B. The Decision Below Violates Due Process Because It Imposes An Unpredictable, Severe And Unfair Retroactive Insurance Liability

The decision below deprives Liberty of due process because it imposes a severe and deeply unfair retroactive civil liability on Liberty. Even if the Due Process Clause were not understood as incorporating Contracts Clause principles per se, the Due Process Clause itself exists more broadly to protect the same settled expectations the Contracts Clause protects specifically in the contract setting. As this Court has recognized, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disregarded." *Landgraf*, 511 U.S. at 265. Accordingly, "due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity." *Eastern Enterprises*, 524 U.S. at 549 (Kennedy, J., concurring). "If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership." *Id.*; *see id.* at 558 ("To find that the Due Process Clause . . . protects against an unfair allocation of public burdens through this kind of specially arbitrary retroactive means – is to read the Clause in light of a basic purpose: *the fair application of law*, which purpose harkens back to the Magna Carta.") (Breyer, J., dissenting). And if "an unfair

retroactive assessment of liability upsets settled expectations, and . . . thereby undermines a basic objective of law itself," *id.* at 558 (Breyer, J., dissenting), it follows that any judicial decision that upsets settled expectations by imposing an unfair retroactive liability on a party necessarily deprives the party of due process *of law itself.*

The Due Process Clause's protection of settled expectations is manifested in the "core due process concepts" of "notice" and "foreseeability." *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001); *see Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) ("notice" or "fair warning" is the "analytic touchstone" of due process analysis); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) ("foreseeability" is "critical to due process analysis"). These requirements of course ensure that a State's actions do not violate the settled, reasonable expectations of its citizens. These requirements apply to courts no less than to legislatures. Thus, this Court has held it to be a violation of due process for a court to assert jurisdiction over a person in the absence of state contacts sufficient to give the person notice of the state's power over him, *see Quill Corp.*, 504 U.S. at 313 (minimum contacts are a "proxy for notice"), to apply a state's law to a party's conduct in violation of the party's reasonable expectations, *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985), and to impose a punitive damage award beyond what a party might reasonably expect given other indicators of the wrongfulness of the conduct, *see BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). It has also held that "limitations on *ex post facto* decisionmaking are inherent in the notion of due process." *Rogers*, 532 U.S. at 456.

The retroactive liability imposed here was imposed without notice, fair warning, or foreseeability of any kind. From 1976 to 1984, and for the two decades preceding the decision below, when Liberty assessed its potential liabilities, calculated premiums, and entered into contracts of insurance, the

law of New Jersey – and every jurisdiction in this country – was that courts were bound to enforce an insurance contract as it is written. As a result, when Liberty and Spaulding agreed to their nine contracts from 1976 to 1984, they had not the least reason to expect that the non-cumulation clause clearly fixing Liberty's total potential liability for continuous injuries would be nullified by a court twenty years later. Even if *Owens-Illinois* or *Carter-Wallace* had given such notice – and they assuredly did not – they were not decided until more than ten years *after* the last of the contracts expired.

Where ex post facto laws are by their nature fundamentally unfair when enacted by a legislature, they are likewise "fundamentally unfair" as the result of judicial rulings. Whether the governmental actor responsible for the infringement is a legislature or a court is irrelevant; the essential stability is no less undermined by seven justices in a courtroom than by a legislature in session. The judicial decision imposing retroactive liability here is little different in substance than the federal statute imposing retroactive liability in *Eastern Enterprises* – except that the decision here was *worse* from a due process perspective, because it was *entirely unforeseeable* when the nullified contractual provisions were agreed to by the parties. In *Eastern Enterprises*, this Court invalidated a federal law imposing several millions of dollars of mineworkers' benefits liability on a coal company for events that took place 35 years earlier. The plurality reasoned: "The distance in the past that the Act reaches back to impose liability on Eastern and the magnitude of that liability raise substantial questions of fairness." *Eastern Enterprises*, 524 U.S. at 534. Although the plurality addressed the problem under the Takings Clause, *see id.* at 533, Justice Kennedy's concurrence – which reflected his decisive fifth vote – explained the same problem in terms of the Due Process Clause, finding a violation of the Clause because "in creating liability for events which occurred 35

years earlier the Coal Act has a retroactive effect of unprecedented scope." *Id.* at 549. And both Justice Kennedy and the four-Justice plurality recognized that while Congress might well have a legitimate interest in resolving "the problem of funding miners' benefits," "the Constitution does not permit a solution to [that] problem . . . that imposes such a disproportionate and severely retroactive burden upon Eastern." *Id.* at 536 (plurality).

So it is here. The decision in this case would fundamentally rework transactions closed between 19 and 27 years ago. In doing so it would impose millions of dollars in unexpected liability on one party to those transactions. While a state may have a legitimate interest in ensuring adequate funds for environmental cleanup, its supreme court cannot accomplish this goal by imposing disproportionate and severely retroactive burdens on insurers who took care to negotiate with their highly sophisticated insureds very specific and unambiguous limits on their liabilities for such cleanup.

The decision below is an affront to the most fundamental premise of the Due Process Clause – that whatever process a party may receive, it will in all events be due process *of law*. The decision below is not law – it is straight confiscatory policymaking. If the New Jersey Legislature had attempted such an act, no court would have allowed it. The fact that a court itself has attempted it does not mitigate, but exacerbates, the constitutional harm. It certainly cannot immunize the act from constitutional review. Certiorari should be granted.

II. THE DECISION BELOW VIOLATES THE TAKINGS CLAUSE

The New Jersey Supreme Court's retroactive imposition of liability on Liberty also violates the Takings Clause, U.S. Const. amend V, for essentially the same reasons it violates due process. "The aim of the [Takings] Clause is to prevent the government 'from forcing some people alone to bear

public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Eastern Enterprises*, 524 U.S. at 522 (plurality opinion) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). That is exactly what the decision below does. As the *Eastern Enterprises* plurality explained, governmental action constitutes an impermissible Taking "if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Eastern Enterprises*, 524 U.S. at 528-29. That test is easily met here: as discussed above, the liability imposed is "severe," it is "retroactive," it is imposed on a "limited class of parties," it "could not have [been] anticipated," and it is "substantially disproportionate to the parties' experience" – which experience, after all, was to negotiate the very liability limitation the decision nullifies.

Certiorari should be granted to rectify the grossly unfair taking of Liberty's property effected by the retroactive imposition of millions of dollars of unforeseeable liability on Liberty.

III. THE DECISION BELOW CONFLICTS WITH OTHER DECISIONS ENFORCING INSURANCE CONTRACTS CONSISTENT WITH THEIR LANGUAGE

It should come as no surprise that the decision below conflicts with decisions of other state courts of last resort holding that contracts, including insurance contracts, must be enforced according to their terms, unless those terms are unconscionable or unlawful. Indeed, decisions from every jurisdiction in the United States have made clear that it is not even within the judicial *power*, as that power is understood in our system of law, to rewrite the unambiguous terms of private contracts, barring fraud, unconscionability, or some other form of illegality in the agreement. "The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or distort, under the guise of con-

struction, contracts, the terms of which are plain and unambiguous." *Hardee v. Hardee*, 585 S.E.2d 501, 503 (S.C. 2003).[8]

This principle of course applies fully to insurance contracts. As the Michigan Supreme Court recently observed in refusing to deviate from the terms of an insurance policy, it is a "bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy." *Wilkie v. Auto-Owners Ins. Co.*, 664 N.W.2d 776, 782 (Mich. 2003). A "highly unusual circumstance" is not a court's professed interest in promoting pollution cleanup in disregard of the terms of private contracts. In direct contrast with the New Jersey Supreme Court in this case, the Michigan court recognized the constitutional dimension of the requirement that insurance contracts must be enforced according to their terms:

> The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from our common-law roots and can be seen in our fundamental charter, the United States Constitution,

---

[8] The principle that courts lack authority under our system of law to disregard the lawful, unambiguous terms of private contracts is so well settled that a complete list of citations endorsing it would be impossible to include in any brief. In addition to the cases cited in the text, the following decisions from state courts of last resort on this point were reported in just the last few months: *Elliott v. Darwin Neibur Farms*, 69 P.3d 1035, 437 (Idaho 2003); *Yarcheski v. Reiner*, 669 N.W.2d 487, 495 (S.D. 2003); *Alpine Haven Property Owners Ass'n, Inc. v. Deptula*, 830 A.2d 78, 86 (Vt. 2003); *Standard Banner Coal Corp. v. Rapoca Energy Co.*, 576 S.E.2d 435, 437 (Va. 2003); *Hertz v. Clovis*, 578 S.E.2d 391, 395 (W. Va. 2003); *Columbia Propane, L.P. v. Wisconsin Gas Co.*, 661 N.W.2d 776, 783 (Wis. 2003).

> where government is forbidden from impairing the obligation of contracts of citizens, art. I, § 10, cl. 1. . . . It is, in short, an unmistakable and ineradicable part of the legal fabric of our society.

Id. at 782. Other state supreme court decisions have similarly recognized that, in our constitutional system, courts "do not rewrite any provision of any contract, including an insurance policy, for any purpose." *Rosen v. State Farm Gen. Ins. Co.*, 70 P.3d 351, 353 (Cal. 2003) (alterations omitted); *see, e.g., Aerojet-General Corp. v. Transport Indemnity Co.*, 948 P.2d 909 (Cal. 1997); *Medlar v. Aetna Ins. Co.*, 248 A.2d 740, 747 (Vt. 1968).

Rosen is especially on point. In that case, the insured made a claim for the cost of repairing two decks, which had been in a state of imminent collapse, despite the fact that coverage under the policy was expressly restricted to actual collapse. The California Supreme Court rejected the argument that notwithstanding the language of the collapse provision in the insurance contract, public policy mandated that the insurer afford coverage:

> Applying the same logic, with the same lack of restraint, courts could convert life insurance into health insurance. In rewriting the coverage provision to conform to their notions of sound public policy, the trial court and the Court of Appeal exceeded their authority, disregarding the clear language of the policy and the equally clear holdings of this court.

Rosen 70 P.3d at 355. In so ruling, the court drew an analogy to earlier rulings addressing coverage for environmental cleanup in which the court had recognized that "[w]hile we agree that it is in everyone's best interests to have hazardous wastes cleaned up, we do not agree that a California court may rewrite an insurance policy for that purpose or for any purpose." *Id.* at 356 (citations omitted).

The decision of the New Jersey Supreme Court in this case cannot be reconciled with these other decisions, or with the deeply embedded constitutional principle they endorse.

IV. THIS CASE IS EXTREMELY IMPORTANT TO INSURERS AND INSUREDS IN NEW JERSEY AND ELSEWHERE

This case is not a minor or commonplace contractual dispute between insurer and insured. The decision below alone means the difference between $1 million and $8.5 million in potential liability for Liberty. But there is much more to it than that. Non-cumulation clauses are a commonplace feature of Liberty's policies. Because no court had ever suggested that such clauses are simply void, for literally decades Liberty sold policies to insureds in New Jersey that included this important cap on Liberty's potential liability. The decision below nullifies the coverage limitation – the essence of the bargain – in every one of those contracts as it applies in continuous injury situations. Potentially scores of millions of dollars are at stake.

This Court has previously acknowledged the enormous costs and virtually inherent unfairness of retroactive insurance liability:

> [I]nsurance depend[s] on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect.

City of Los Angeles v. Manhart, 435 U.S. 702, 721 (1978). *Manhart* involved the retroactive application of a federal re-

regulatory statute affecting insurance funds, not a statute or court decision retroactively nullifying a fundamental liability limitation in an insurance contract. But its recognition of the inequities and hidden costs of imposing retroactive insurance liability of any kind is directly applicable here.

The costs and unfairness do not affect Liberty alone. Non-cumulation clauses are not provisions secretly or uniquely devised by Liberty. They are a commonplace feature of policies sold by many other insurers as well. The court below well understood that it was not imposing a special burden on Liberty alone – it was tapping the resources of every insurer with a policy in New Jersey limiting its liability over successive contracts. The more coverage, the better, the court explicitly held.

In short, the Due Process Clause and Takings violation that occurred here will not affect just this one insurer in this one case. It will affect many other insurers in many other cases. The retroactive effect of the law across the industry will be enormous.

This case is thus an appropriate vehicle through which to remind state courts that, while the common law may be capable of evolving, at bottom courts must always remain courts *of law*. Review and reversal here need not draw this Court into endless battles over claimed error in state-law contractual disputes. As we have explained, the error here is of a qualitatively different kind: whether or not the court below was correct in its reading of prior precedents, what cannot be disputed is that the decision (1) nullifies an unambiguous contractual provision, (2) does so retroactively, and (3) in a manner that was wholly unforeseeable at the time, now more than twenty years ago, that the contracts were entered into. The asserted error, in other words, is not one of state law; indeed it is just the opposite. Liberty does not dispute that the New Jersey Supreme Court, as the final arbiter of New Jersey state law, is entitled to interpret contracts in accordance with its well-settled principles of contract inter-

pretation. But an approach in which judges divine a public policy and then rewrite contracts made years earlier is antagonistic to due process of law. If New Jersey law allows a court to refuse to enforce an unambiguous insurance liability limitation simply to increase the insurance dollars available for environmental cleanup, then application of that New Jersey law to Liberty deprives Liberty of due process and takes its property without just compensation.

Because it is the rare court that departs so fundamentally from the basic precepts of law that govern all courts, it is the rare petition for certiorari in a contract dispute, otherwise governed by state law, that presents – or ever would present – a meritorious federal constitutional claim. Recognition of that claim here thus would ultimately have the salutary effect of minimizing the number of petitions claiming such error, for reversal of the decision below would serve as a potent reminder to all state courts that they must continue, as they largely have for centuries, to respect the boundaries of their critically important role as arbiters of law in our constitutional order.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W
Washington, D.C. 20006
(202) 383-5300

JOHN C. SULLIVAN
(*Counsel of Record*)
POST & SCHELL PC
Four Penn Center
1600 John F. Kennedy Boulevard
Philadelphia, Pennsylvania 19103
(215) 587-1000